BLANK PAGE

FILE COPY

Public Documents Dept. U.S.
FEB 24 1941
Stanford University

BLANK PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and rules involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	7
Argument	12
I. The District Court was without jurisdiction of this action	13
A. The action was not authorized by the Tucker Act	13
B. The jurisdiction of the District Court under the Tucker Act is not enlarged by the Federal Rules of Civil Procedure	30
C. Even apart from the limitations of the Tucker Act, the federal courts have no jurisdiction to entertain supplementary proceedings in cases where they would have had no jurisdiction to entertain the original action	34
II. The maintenance of this action is precluded by R. S. 3477	37
III. Section 795 of the New York Civil Practice Act does not authorize supplementary proceedings against the United States	50
Conclusion	55
Appendix	56

CITATIONS

Cases:	
Alabama v. *United States*, 282 U. S. 502	21
Bank v. *Turnbull & Co.*, 16 Wall. 190	35
Barton v. *Albright*, 29 Ind. 489	18, 29
Bates Mfg. Co. v. *United States*, 303 U. S. 567	14
Becker v. *Romanzo*, 245 App. Div. 185; 281 N. Y. S. 317	24
Berryman v. *Board of Education of City of Buffalo*, 12 N. Y. S. (2d) 135	53
Bicknell v. *Lloyd-Smith*, 109 F. (2d) 527	32
Bool Floral Co., Inc. v. *Coyne*, 158 Misc. 13; 284 N. Y. Supp. 960	54
Bowes v. *Perkins*, 169 Misc. 624; 8 N. Y. S. (2d) 525	54
Bray v. *United States Fidelity & Guaranty Co.*, 267 Fed. 533	49
Breading v. *Siegworth*, 29 Pa. St. 396	18
Brearton v. *Morgan*, 257 App. Div. (N. Y.) 34	53

Cases—Continued. Page

Brown v. *Dudley*, 33 N. H. 511 18
Brucker v. *Georgia Casualty Co.*, 14 F. (2d) 688 35
Buchanan v. *Alexander*, 4 How. 20 23
Buford v. *Strother*, 10 Fed. 406 35
Bush Terminal Co. v. *City of New York*, 259 N. Y. 509 53
Cameron v. *Stollenwerck*, 6 Ala. 704 ..... 18, 29
Chapman v. *Borger*, 4 Dillon, 557 35
Claflin v. *McDermott*, 12 Fed. 375 34
Cotton v. *United States*, 11 How. 228 52
Cross Bay Lumber Co. v. *Samoa*, 161 Misc. 458; 293 N. Y. Supp. 794 54
Davidson v. *City of New York*, 221 N. Y. 487 53
Davis v. *Bruns*, 23 Hun. (N. Y.) 648 34
Deering v. *Richardson-Kimball Co.*, 109 Cal. 73; 41 Pac. 801 18
Dibner v. *Cousminer*, 157 Misc. 229; 283 N. Y. Supp. 369 54
Dugan v. *United States*, 3 Wheat. 172 52
Edmondson v. *Dekalb County*, 51 Ala. 103 18
Erwin v. *United States*, 97 U. S. 392 ..... 45, 46
Federal Housing Administration v. *Burr*, 309 U. S. 242 ..... 9, 20, 22, 23, 50
Federal Land Bank v. *Priddy*, 295 U. S. 229 54
Fidelity Union Trust Co. v. *Field*, No. 32 present Term 55
Flash v. *Dillon*, 22 Fed. 1 35
Gerstenzang, In re, 5 F. Supp. 904 49
Goodman v. *Niblack*, 102 U. S. 556 ..... 38, 40, 45, 46
Groves v. *Brown*, 11 Mass. 333 18
Guarantee Co. v. *Title Guaranty Co.*, 224 U. S. 152 52
Harris v. *Balk*, 198 U. S. 215 18
Heilman v. *St. Cloud Restaurant, Inc.*, 164 Misc. 15; 297 N. Y. Supp. 111 54
Hill v. *United States*, 40 Fed. 441 25
Hobbs v. *McLean*, 117 U. S. 567 ..... 39, 40
Hollywood Garage Corp. v. *Pettis & Co.*, 169 Misc. 906; 9 N. Y. S. (2d) 379 54
Houston v. *Ormes*, 252 U. S. 469 ..... 49, 50
Howes & Co. v. *United States*, 24 C. Cls. 170 ..... 30, 42
Jackson v. *United States*, 27 C. Cls. 74 ..... 16, 21
Keifer & Keifer v. *Reconstruction Finance Corporation*, 306 U. S. 381 23
King v. *Shepherd*, 20 Fed. 337 35
Lackawanna Coal & Iron Co. v. *Bates*, 56 Fed. 737 37
Lahman v. *Supernawt*, 47 F. (2d) 610 35
Leather & Leigh v. *United States*, 61 C. Cls. 388 ..... 16, 21
London & Lancashire Indemnity Co. v. *Courtney*, 106 F. (2d) 277 37
Lynn v. *United States*, 110 F. (2d) 586 ..... 16, 27, 31

Cases—Continued. **Page**

Maltbie, Matter of v. *Lobsitz Mills Co.*, 223 N. Y. 227 34
Martin v. *National Surety Co.*, 300 U. S. 588 ..... 39, 40
Miller v. *Superior Court*, 82 Cal. App. 634; 256 Pac. 431 18
Minor v. *Erie R. Co.*, 171 N. Y. 566 53
Munro v. *United States*, 303 U. S. 36 33
Mutual Reserve Fund Life Assn. v. *Phelps*, 190 U. S. 147 35
Nankivel v. *Omsk All Russian Govt.*, 237 N. Y. 150 17
National Tube Works Co. v. *Ballou*, 146 U. S. 517 34
Neirbo Co. v. *Bethlehem Corp.*, 308 U. S. 165 33
Nutt v. *Knut*, 200 U. S. 12 39
Osterhoudt v. *Stade*, 133 App. Div. 83, 117 N. Y. Supp. 809 53
Penn Co. v. *Pennsylvania*, 294 U. S. 189 33
People v. *Miller*, 94 App. Div. 567; 88 N. Y. S. 253 53
Poole v. *Thatcherdeft*, 19 Fed. 49 35
Pottasch Bros. Co., In re, 79 F. (2d) 613 49
Pratt v. *Albright*, 9 Fed. 634 35
Price v. *Forrest*, 173 U. S. 410 ..... 45, 47
Price v. *United States and Osage Indians*, 174 U. S. 373 ..... 20, 29
Rader v. *B. & O. R. Co.*, 108 F. (2d) 980 32
Rickey & Slingerland, 143 Misc. 583, 256 N. Y. Supp. 901 53
Rocky Mountain National Bank v. *Bliss*, 89 N. Y. 338 34
Rosen v. *Lipshitz*, 149 Misc. 144; 266 N. Y. S. 797 24
Rosenstock v. *City of New York*, 101 App. Div. 9, 91 N. Y. Supp. 737 53
Ruff v. *Ruff*, 85 Pa. St. 333 ..... 18, 29
Saranac L. & T. Co. v. *Roberts*, 195 N. Y. 303 52
Schillinger v. *United States*, 155 U. S. 163 ..... 20, 29
Schino v. *Cinquini*, 7 Cal. App. 244; 94 Pac. 83 18
Seaboard Air Line Ry. v. *United States*, 256 U. S. 655 ..... 45, 46
Shaw v. *United States*, 309 U. S. 495 21
Six Companies of California v. *Joint Highway District*, No. 267, present Term 55
Skinner & Eddy Corp. v. *McCarl*, 275 U. S. 1 50
Spofford v. *Kirk*, 97 U. S. 484 44
Stanley v. *Schwalby*, 147 U. S. 508 52
Stark v. *United States*, 14 F. (2d) 616 ..... 16, 27
Stoner v. *New York Life Ins. Co.*, No. 74, present Term 55
Tams v. *Bullitt*, 35 Pa. St. 308 18
Tarbell v. *Griggs*, 3 Paige (N. Y.) 207 34
Tempel v. *United States*, 248 U. S. 121 21
Tompkins v. *Purcell*, 12 Hun. (N. Y.) 662 34
United States v. *Cooper*, No. 484, this Term 52
United States v. *Herron*, 20 Wall. 251 52
United States v. *Jones*, 131 U. S. 1 ..... 14, 21
United States v. *Michel*, 282 U. S. 656 ..... 20, 29

Cases—Continued. Page

United States v. *Nipissing Mines Co.*, 206 Fed. 431 26
United States v. *Pfitsch*, 256 U. S. 547 ..... 14, 26
United States v. *Turner*, 47 F. (2d) 86 21
United States v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506 21
Van Seggern Bros. v. *Antelope County State Bank*, 57 S. D. 415; 232 N. W. 913 18
Waite v. *United States*, 57 C. Cls. 546 16
Walser v. *Seligman*, 13 Fed. 415 34
Warthen v. *Melton*, 132 Ga. 113; 63 S. E. 832 18
Weber v. *Humphreys*, 5 Dillon 223 35
West v. *American Tel. & Tel. Co.*, Nos. 44, 45, present Term 55
Western Pacific R. R. Co. v. *United States*, 268 U. S. 271 ..... 45, 46, 47
Williams v. *United States*, 289 U. S. 553 ..... 14, 15, 26

U. S. Statutes:

Act of February 24, 1855, c. 122, 10 Stat. 612 15
Act of March 3, 1863, c. 92, 12 Stat. 765 15
Act of May 9, 1866, c. 74, 14 Stat. 44 15
Act of March 3, 1887, c. 359, 24 Stat. 505 (28 U. S. C. §§ 41 (20), 250) 3, 7, 9, 12, 13, 58
Act of March 3, 1911, c. 231, 36 Stat. 1087 15
Act of June 19, 1934, c. 651, 48 Stat. 1064 (28 U. S. C. § 723c) 27
National Housing Act as amended August 28, 1935, c. 614, 49 Stat. 684, 722 22
Assignment of Claims Act of 1940 (Public, No. 811, c. 779, 76th Cong., 3d Sess.) 40
R. S. § 3477 (31 U. S. C. § 203) 5, 10, 11, 13, 33, 37, 44, 46, 58
R. S. §§ 935, 936, 937 (28 U. S. C. §§ 748–750) 59

State Statutes:

California Code of Civil Procedure, Secs. 717–720 ..... 18, 28
Idaho Code Ann. (1932) Sec. 8–504 28
Kent. Code of Practice (Carroll 3d ed. 1900) Sec. 227 28
New York Civil Practice Act:
Section 684 ..... 52, 53
Section 773 ..... 19, 33, 56
Sections 773–810 51
Section 795 ..... 3, 5, 7, 8, 9, 12, 13, 17, 18, 19, 24, 25, 33, 40, 44, 50, 51, 52, 55, 56
Sections 804–810 ..... 24, 30
Section 807 57
New York Court of Claims Act, Sec. 17 53
New York General Construction Law, Sec. 37 ..... 52, 57
New York Laws 1905, c. 175 53
New York Laws 1910, c. 317 53
N. D. Comp. Laws (1913), V. 2, Section 7785 28
Nevada Comp. Laws (1929), V. 4, Section 8866 28

State Statutes—Continued. Page
Mich. Stat. Ann, V. 22, Sec. 27.2176 28
Rev. Code of Mont. (1935), V. 4, Section 9460 28
Williams Tenn. Code Ann. (1934) V. 6, Sec. 9444 ..... 28, 29
Wis. Stat. (1935), Secs. 267.01–267.21 28
Wyo. Rev. Stat. (1931) Sec. 89–3117 28
Miscellaneous:
Curtis, *Statutes and Statutory Construction*, found in 1 McKinney's *Consolidated Laws of New York*, Sec. 65 52
Endlich, *Interpretation of Statutes* (1888), Secs. 161, 167 52
Federal Rules of Civil Procedure:
Rule 1 60
Rule 9 ..... 33, 60
Rule 17 ..... 5, 9, 32, 33, 61
Rule 38a 27
Rule 39 27
Rule 69 ..... 31, 33, 61
Rule 82 ..... 10, 62
54 Harv. L. Rev. 518, 519 54
H. Rep. No. 2925, 76th Cong., 3d Sess 41
Proceedings of the Washington Institute on Federal Rules (Thursday Afternoon Session, Oct. 6, 1938, p. 79) 27
S. Rep. No. 2136, 76th Cong., 3d Sess 41
Sutherland, *Statutory Construction* (2d ed. 1904), Secs. 514, 694 52

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 500

THE UNITED STATES OF AMERICA, PETITIONER

v.

JACOB L. SHERWOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of New York (R. 20) is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 21–30) is reported in 112 F. (2d) 587.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit (R. 31) was entered on July 12, 1940. The petition for a writ of certiorari was filed on October 11, 1940 and was

granted November 18, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a creditor on a judgment obtained in a New York court against his debtor may, by virtue of Section 795 of the New York Civil Practice Act, maintain an action against the United States under the Tucker Act for recovery on a claim of the judgment debtor against the United States.

2. Whether the District Court has jurisdiction under the Tucker Act where the judgment debtor is joined as party defendant.

3. Whether the jurisdiction of the District Courts under the Tucker Act has been enlarged by the Federal Rules of Civil Procedure.

4. Whether the maintenance of this action is prohibited by R. S. § 3477 governing the transfer of claims against the United States.

5. Whether the United States is a "person or corporation * * * indebted to the judgment-debtor" within the meaning of Section 795 of the New York Civil Practice Act.

STATUTES AND RULES INVOLVED

The applicable portions of the statutes and Rules involved are set forth in the Appendix, *infra*, pp. 56–62.

STATEMENT

On April 1, 1939, respondent Sherwood brought suit against the United States under the Tucker Act[1] in the United States District Court for the Eastern District of New York, alleging that one Kaiser, his judgment debtor, had entered into a contract with the United States, and that the United States was liable for breach of the contract. In reliance on Section 795 of the New York Civil Practice Act, the complaint alleged as to each cause of action that suit was brought pursuant to an order of the Supreme Court of New York, Queens County,[2] which order had duly authorized and empowered the respondent to maintain the action "nunc pro tunc as of September 1, 1937" as a judgment creditor of Frederick M. Kaiser.[3] (R. 17, 18, 19.)

---

[1] 28 U. S. C. §§ 41 (20), 250, c. 359, 24 Stat. 505.

[2] Although the complaint does not set forth the terms of that order and it is not set forth elsewhere in the record, the affidavit of plaintiff in opposition to dismissal states that a copy of the order was served on the United States Attorney and would be submitted at the argument of the motion (R. 13). Included in the Appendix, *infra*, p. 62, is a copy of the order furnished us by counsel for respondent, and it will not be disputed that it is a true copy of the order alleged in paragraph Eleventh (R. 17), Eighteenth (R. 18), and Twenty-fourth (R. 19) of the complaint. The order is entitled "In the Matter of Supplementary Proceedings: Jacob L. Sherwood, Judgment Creditor, against Frederick M. Kaiser, Judgment Debtor".

[3] Kaiser entered into a contract with the United States on January 27, 1933, for the construction of a post office at East Greenwich, Rhode Island (R. 3). On September 25,

Three causes of action, involving claims aggregating $14,445.45, were set forth in the complaint, and judgment in the amount of $10,000 was sought (R. 15–19). Pursuant to the New York statute, Kaiser was named defendant in the action (R. 15–19).

On January 17, 1939, prior to institution of the present suit, the United States had brought an action against Kaiser and his surety, the Fidelity & Deposit Company of Maryland, in which the United States asked judgment in the sum of $15,861.85 as a result of Kaiser's failure to perform his contract (R. 5–6). Both Kaiser and his surety appeared, answered, and demanded a jury trial (R. 6).[4]

1933, the United States, being dissatisfied with the progress then being made, notified Kaiser and his surety that the right to proceed was terminated (R. 4). The right to proceed was restored on October 28, 1933, at the surety's request (R. 4), and Kaiser was authorized to proceed on December 16, 1933 (R. 5). Kaiser, however, failed to perform any work subsequently, and on January 26, 1934, Kaiser and his surety were again notified of the termination of Kaiser's right to proceed (R. 5). The surety notified the Government on April 4, 1934, that it did not elect to complete the work (R. 5). Pursuant to an invitation to bid, the contract to complete the work was awarded to another concern (R. 5).

[4] On January 20, 1939, three days after institution of suit by the United States against Kaiser and his surety, Sherwood brought an action against the United States for $10,000, alleging an assignment of Kaiser's claim against the United States for breach of contract (R. 6). On March 30, 1939, that action was dismissed on the ground that it was in con-

By agreement of counsel, and order thereon by Judge Byers, dated May 15, 1939, the two actions were consolidated (R. 9–10). Thereafter, counsel for the Government concluded that the consolidation was improper (R. 10) and moved to vacate the order of consolidation as well as to dismiss the complaint of Sherwood (R. 2–3). Each branch of the Government's motion was separately granted (R. 2, 20). No appeal was taken from the order vacating the order of consolidation. On appeal from the order of dismissal, the court below reversed. The court held that, under Rule 17 (b) of the Federal Rules of Civil Procedure, the respondent's "capacity to sue" was governed by the law of his domicile, and that the state court order pursuant to Section 795 of the New York Civil Practice Act conferred authority upon the respondent to maintain the present action. The court further held that the United States is a "person indebted" within the meaning of Section 795 and that therefore the state court could authorize an action against the United States under the Tucker Act; that the

---

travention of Section 3477 of the Revised Statutes (R. 9). Thereafter, on April 1, 1939, Sherwood commenced the present action, alleging as before the claim of Kaiser, but no longer pleading the assignment formerly relied on. The order of the state court relied on to authorize the present action was dated February 8, 1939, granted on an affidavit sworn to the previous day, three weeks after commencement of the action by the United States against Kaiser and while Sherwood's first action alleging an assignment was still pending. Appendix, *infra*, p. 62.

maintenance of the action was not prohibited by R. S. § 3477 restricting the transfer of claims against the Government; and that the two actions should be consolidated.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that a creditor on a judgment obtained in a New York court against his debtor may, by virtue of Section 795 of the New York Civil Practice Act, maintain an action against the United States under the Tucker Act for recovery on a claim of his judgment debtor against the United States.

2. In construing and applying the Federal Rules of Civil Procedure so as to affect the jurisdiction of the federal courts in Tucker Act cases.

3. In construing Rule 17 (b) of the Federal Rules of Civil Procedure as referring to the right to maintain an action under Section 795 of the New York Civil Practice Act.

4. In holding that Rule 17 (b) of the Federal Rules of Civil Procedure, as so construed, authorizes the maintenance of this action against the United States under the Tucker Act.

5. In holding that the joinder of respondent's judgment debtor as a codefendant with the United States did not deprive the District Court of jurisdiction under the Tucker Act.

6. In holding that the grant of authority to maintain this action under Section 795 of the New York Civil Practice Act did not violate R. S. § 3477.

7. In holding that the United States is a "person" within the meaning of Section 795 of the New York Civil Practice Act.

8. In reversing the judgment of the District Court of the United States for the Eastern District of New York.

SUMMARY OF ARGUMENT

I

1. The jurisdiction of the district courts under the Tucker Act is limited to claims "against the United States". The district courts sitting as courts of claims have no jurisdiction of actions between private persons to which the United States is not a party and such actions do not come within the Tucker Act jurisdiction merely because the Government is joined as a defendant in order that the plaintiff may secure execution on a judgment against the private party defendant. Plainly, therefore, Sherwood's original action against Kaiser could not have been maintained in the District Court even though the United States were joined under a local garnishment statute as a means of satisfying any judgment rendered against Kaiser.

The case is not altered because judgment has been rendered against Kaiser by the state court. Fundamental issues remain between the private parties notwithstanding the judgment. Section 795

of the New York Civil Practice Act, pursuant to which Sherwood was authorized by the state court to bring this suit, contemplates the litigation of more than the single issue of liability on the claim of Kaiser against the United States, which alone is within the Tucker Act jurisdiction. It contemplates, in addition, litigation of the question of the validity of the judgment against the judgment debtor. In the absence of a valid judgment and order against him, no judgment can be entered in turn against his debtor. Further, the judgment debtor may raise the issue of the validity of the *ex parte* order authorizing the supplementary proceedings; such an issue was actually adjudicated by the court below in this case. Section 795 also seeks to give the judgment debtor his day in court as to the amount of recovery so as to prevent subsequent action by him or by other creditors of his. Moreover, there is nothing in the New York practice to prevent other judgment creditors from being made parties to the proceedings so as to have all the rights of all parties decided at one time. To hold, as did the court below, that the jurisdiction of the District Courts under the Tucker Act may be invoked in this type of proceeding is to allow use of that Act as a means for the settlement of insolvent estates of claimants against the United States. Such a construction of the Tucker Act is a far cry from the intendment of Congress in enacting it.

Moreover, the proceedings authorized by Section 795 are clearly supplementary in character. It is an established doctrine that even a federal court of "general" jurisdiction will not maintain such an action in aid of enforcement of a state court judgment. In these circumstances, it seems plain that Congress did not intend to authorize the District Courts to maintain such actions under the limited jurisdiction conferred upon them by the Tucker Act.

2. *Federal Housing Administration* v. *Burr*, 309 U. S. 242, furnishes no support for the judgment below. That decision is limited in its application to modern governmental corporations authorized to "sue-and-be-sued" in both state and federal courts of "general" jurisdiction competent to adjudicate issues between private parties. The decision is founded on the modern Congressional policy, reflected in recent enactments, of relaxing governmental immunity in the case of such corporations. It has no application to the construction of the Tucker Act, enacted in 1887, and creating special courts of limited jurisdiction to adjudicate claims against the United States. Any attempt to construe the Tucker Act in the light of modern and unrelated enactments raises a number of difficulties forcibly suggesting that the Act was not intended to extend to third party proceedings.

3. The jurisdiction of the district courts is not enlarged by the provisions of Rule 17 (b) of the

Federal Rules of Civil Procedure. Those Rules, of course, are applicable to Tucker Act proceedings, but they are limited to matters of procedure and do not extend to matters of jurisdiction. Rule 82 expressly so provides.

II

The order of the state court authorizing the present action is null and void under the express provisions of R. S. § 3477, prohibiting all transfers of claims against the United States. One of the purposes of this statute was to protect the Government against multiplication of the persons with whom it must deal and consequent embarrassment in the conduct of the Government's business.

Where, as in this case, the judgment creditor's claim is for less than the full amount of the judgment debtor's claim against the United States, the authorization of supplementary proceedings by the judgment creditor obviously multiplies the number of persons with whom the Government must deal. The evil is by no means theoretical, as the facts of this case show. The United States has filed an independent action against Kaiser for breach of the same contract on which this action is founded. Any attempt to settle or compromise the conflicting claims of the United States and Kaiser are dependent on Sherwood's consent if these proceedings are maintainable.

The situation would not be materially different even if Sherwood's judgment equalled or exceeded the amount of Kaiser's claim against the United

States. In order to avoid the risk of an affirmative judgment against him, Kaiser might be willing to release his claim in exchange for a release or reduction of the Government's claim against him. Sherwood, whose sole interest is in satisfying his judgment, would clearly have no interest in effecting such a settlement. The only risk which Sherwood incurs is that judgment on the Government's claim may defeat any recovery on Kaiser's claim; Sherwood does not share the further risk facing Kaiser of liability on an affirmative judgment in favor of the United States.

The court below held that the transfer of the claim was not within the prohibition of R. S. § 3477 because it was a transfer "by operation of law". Although this Court has held in a number of cases that certain transfers by operation of law are beyond the scope of the statute, analysis of the decisions makes clear that they were based upon the policy of the Act and not the form of the transfers. The decisions plainly indicate that any transfer which conflicts with both the letter and policy of the statute falls within its sphere of operation, whether the transfer be by operation of law or not.

The type of situation to which R. S. § 3477 is inapplicable is that presented where all of the claimants' property has been transferred to his

successor or representative. In such cases, the transferee or legal successor is substituted for the original claimant and is in precisely the same position as the original claimant with respect to the claim against the United States and with respect to any counterclaims which the United States may have. Such a transfer, as distinguished from the type of transfer here involved, in no way multiplies the number of persons with whom the Government must deal and cannot embarrass the conduct of its business. The only cases in which transfers "by operation of law" of claims against the United States have been sustained, apart from a general transfer of all the claimant's assets, are those in which the Government had previously allowed the claim and, at the time of the transfer, was in the position of a mere stakeholder. Such transfers obviously do not embroil the Government in the conflicting claims of private parties.

III

The judgment below should be reversed for the further reason that Section 795 of the New York Civil Practice Act, properly construed, does not authorize an action on a claim against the United States.

ARGUMENT

The present suit was brought under the provisions of the Tucker Act (c. 359, 24 Stat. 505, 28 U. S. C. §§ 41 (20), 250). It is the Government's

position that the District Court was without jurisdiction to entertain the proceeding because the jurisdiction conferred upon the District Court by the Tucker Act is limited to original actions on claims against the United States and does not extend to third party proceedings, original or supplementary, involving issues between private individuals. The Government further contends that maintenance of the present action is precluded by R. S. § 3477, which prohibits the transfer of claims against the United States. And finally, the Government urges that, as a matter of New York law, the respondent was not properly authorized to maintain the action because the statutory provision pursuant to which the proceedings were authorized by the state court (Section 795 of the New York Civil Practice Act) does not apply to claims against the United States.

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION OF THIS ACTION

A. THE ACTION WAS NOT AUTHORIZED BY THE TUCKER ACT

There is nothing in the Tucker Act or in the decisions interpreting it that authorizes the present supplementary proceeding against the United States.

The Tucker Act, *inter alia,* confers on the district courts jurisdiction "concurrent with the Court of Claims, of all claims not exceeding $10,000 * * * upon any contract, express or

implied, with the Government of the United States * * *, in respect to which claims the party would be entitled to redress against the United States * * * if the United States were suable". The Act provides in addition that "All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury." The jurisdiction conferred on the district courts by this Act is "the exceptional jurisdiction concurrent with the Court of Claims where it sits without a jury" (*United States* v. *Pfitsch,* 256 U. S. 547), and is the same in substance as the jurisdiction of the Court of Claims. *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, 571; *United States* v. *Jones,* 131 U. S. 1. The concurrent jurisdiction is "an integrated jurisdictional plan by which the Court of Claims and District Courts could afford equal opportunities for expeditious and fair trials of like claims within the jurisdictional amount of the District Courts." *Bates Mfg. Co.* v. *United States, supra,* at 571.

The Tucker Act must be construed in the light of the constitutional source of the Court of Claims' jurisdiction, namely, the power to provide for the payment of the debts of the United States, not the power derived from Article III to establish inferior courts having jurisdiction of varied cases and controversies. *Williams* v. *United States,* 289 U. S. 553, 569, 573. As pointed out in the *Williams* case, the Court of Claims was originally set up as

an administrative or advisory body to investigate claims against the United States. See Act of February 24, 1855, 10 Stat. 612; Act of March 3, 1863, 12 Stat. 765. Although it was subsequently converted into a legislative court and given jurisdiction over controversies which were susceptible of judicial cognizance,[5] its jurisdiction nevertheless remained confined to the limited function of hearing and determining claims against the United States; over any other types of cases or controversies it was given no jurisdiction whatever. And, as we have pointed out, the jurisdiction of the district courts under the Tucker Act is similarly restricted.[6]

It is manifest, therefore, that the district courts sitting as courts of claims are without jurisdiction of proceedings between private persons to which the United States is not a party. And such proceedings cannot be brought within the Tucker Act jurisdiction merely by garnisheeing a claim of the principal debtor against the United States as a means of satisfying any judgment which might be rendered against such debtor. It is well settled

---

[5] Act of May 9, 1866, 14 Stat. 44; Act of March 3, 1887, 24 Stat. 505; Act of March 3, 1911, 36 Stat. 1087.

[6] It is only because the Court of Claims, a legislative court, exercises judicial power, although not derived from Article III, that appellate jurisdiction over its judgments can be conferred on this Court or "*concurrent* jurisdiction * * * conferred on the federal district courts". *Williams* v. *United States*, *supra*, at 565 [emphasis supplied].

that, since the Court of Claims and the district courts under the Tucker Act were established for the sole purpose of awarding money judgments "against the United States" in proper cases, only the Government may be a party defendant. *Lynn* v. *United States,* 110 F. (2d) 586 (C. C. A. 5th); *Stark* v. *United States,* 14 F. (2d) 616, 618 (S. D. Ohio); *Leather & Leigh* v. *United States,* 61 C. Cls. 388; *Waite* v. *United States,* 57 C. Cls. 546; *Jackson* v. *United States,* 27 C. Cls. 74. These decisions can not be distinguished on the ground that this action was brought in the District Court which, unlike the Court of Claims, has a "general" jurisdiction apart from the Tucker Act. So far as concerns any separate controversy between the creditor and the claimant, the District Court lacked any jurisdiction, there being neither diversity of citizenship nor a federal question. Under the Tucker Act, the jurisdiction of the District Court sitting as a court of claims is as limited as that of the Court of Claims, and carries with it no ancillary jurisdiction to determine controversies between private parties.

Plainly, therefore, an action by a creditor against his debtor to recover a money judgment does not become a claim "against the United States" merely by joining with it, for purposes of execution, an ancillary action on a claim of the principal debtor against the United States. The case is not altered because judgment has already been rendered by the

state court. Not only do issues remain which the District Court has no jurisdiction under the Tucker Act to determine, but the supplementary character of the proceedings also indicates that the action is not one within the scope of the Tucker Act.

1. Contrary to respondent's contention, the defendant Kaiser is not merely a formal party. Section 795 of the New York Civil Practice Act, pursuant to which Sherwood was authorized by the state court to bring this suit, contemplates the litigation of more than the single issue of liability on the claim of Kaiser against the United States, which alone is within the Tucker Act jurisdiction. *Nankivel* v. *Omsk All Russian Govt.*, 237 N. Y. 150, 158. It contemplates, in addition, litigation of the question of the validity of the judgment against the judgment debtor (see *Nankivel* v. *Omsk All Russian Govt., supra*), because, in the absence of a valid judgment and order against him, no judgment can be entered in turn against his debtor.[7]

---

[7] This, if actions such as this one be permitted against the United States under the Tucker Act, the United States would have added burdens of investigation and defense for its own protection, beyond the normal ones in a Tucker Act case, particularly where the judgment debtor defaulted. For its own protection, the United States would have to investigate and perhaps litigate the questions of validity of service and judgment in the original action, the validity of the supplementary proceedings, the validity of the state court's order under Section 795, and the validity of service on the judgment debtor in the Tucker Act suit. This burden and these foreign issues seem entirely incompatible with the theory of the Tucker Act.

Cf. *Van Seggern Bros.* v. *Antelope County State Bank,* 57 S. D. 415; 232 N. W. 913; *Warthen* v. *Melton,* 132 Ga. 113, 63 S. E. 832. As a matter of fact, the court below actually adjudicated an issue between judgment creditor and judgment debtor, the issue of "the validity of the order authorizing supplementary proceedings against him" (R. 30). Section 795 also seeks to give the judgment debtor his day in court as to the amount of recovery (cf. *Edmondson* v. *Dekalb County,* 51 Ala. 103) so as to prevent subsequent action by him (cf. *Harris* v. *Balk,* 198 U. S. 215; *Ruff* v. *Ruff,* 85 Pa. St. 333; *Tams* v. *Bullitt,* 35 Pa. St. 308; *Cameron* v. *Stollenwerck,* 6 Ala. 704; *Barton* v. *Albright,* 29 Ind. 489; *Groves* v. *Brown,* 11 Mass. 333; *Brown* v. *Dudley,* 33 N. H. 511), or by other creditors of his (cf. *Breading* v. *Siegworth,* 29 Pa. St. 396). Moreover, there is nothing in the New York practice to prevent other judgment creditors from being made parties to the proceedings so as to have all the rights of all parties decided at one time.[8] In other words, the scheme of the practice is to determine how much the third party owes to the judgment debtor and who among his judgment creditors is to share in that amount. To hold, as did the court

[8] Such is the ruling under the similar provision of the California law. See California Code of Civil Procedure, Sections 717–720; *Deering* v. *Richardson-Kimball Co.,* 109 Cal. 73, 41 Pac. 801; *Schino* v. *Cinquini,* 7 Cal. App. 244, 94 Pac. 83; *Miller* v. *Superior Court,* 82 Cal. App. 634, 256 Pac. 431.

below, that the jurisdiction of the district courts under the Tucker Act may be invoked for this purpose is to allow use of that Act as a means for the settlement of insolvent estates of claimants against the United States. Such a construction of the Tucker Act is a far cry from the intendment of Congress in enacting it.

2. Even apart from these considerations, which we deem decisive, the District Court is without jurisdiction under the Tucker Act because of the supplementary character of the procedings authorized by Section 795.

In no sense can the present action be considered as an independent suit. Section 773 of the New York Civil Practice Act (which is part of the same article of the Civil Practice Act as Section 795) provides that "to entitle a judgment creditor to maintain a special proceeding authorized by this article, the judgment must have been rendered in any sum by a court of this state, whether or not of record". And Section 795 itself makes provision for the form of the order or judgment which may be entered in the proceeding which the judgment creditor is authorized to institute. It specifically states, for example, that the order or judgment in that proceeding may "provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment, costs, disbursements and expenses allowed by the court." It further provides that if the debtor of the judgment debtor does not

dispute the indebtedness, costs are not to be entered against him. It likewise imposes as a mandatory requirement that the judgment creditor make the judgment debtor a party defendant. Certainly, no proceeding in the federal courts in which the New York Civil Practice Act governs the necessary parties defendant and the character of the judgment as to costs and as to any surplus recovery can fairly be characterized as an independent action.

As we show below (*infra*, pp. 34–37), the supplementary character of the proceeding and the fact that it is governed by the provisions of the New York Civil Practice Act would be fatal to the maintenance of such an action against a private person in a federal court of "general" jurisdiction in aid of enforcement of a state court judgment. And certainly it cannot be supposed that Congress intended to authorize such actions under the limited jurisdiction conferred by the Tucker Act. The Act contains no language expressly extending jurisdiction to such proceedings and, in view of the well-settled principle that a statute relaxing governmental immunity should be strictly construed, jurisdiction cannot be founded on implication. *United States* v. *Michel*, 282 U. S. 656; *Price* v. *United States and Osage Indians*, 174 U. S. 373; *Schillinger* v. *United States*, 155 U. S. 163.[9]

---

[9] While the rule of strict construction has been relaxed in cases involving the suability of "modern federal governmental corporations" (*Federal Housing Administration* v.

Many restrictions on the jurisdiction of the Court of Claims and of the district courts sitting as courts of claims have been imposed because of the limited purpose for which jurisdiction was conferred upon them by the Tucker Act. The problem is not merely a textual one to be solved by reference to the statutory language. Thus it has been held that notwithstanding the reference to "any contract, express or implied", there is no jurisdiction under the Tucker Act to enforce contracts implied in law. *Alabama* v. *United States*, 282 U. S. 502; *Tempel* v. *United States*, 248 U. S. 121. Likewise, it has been held that the Tucker Act is limited to actions for a sum of money only and that, notwithstanding the reference to "equity" in the Act, the Court of Claims lacks jurisdiction to grant the usual equity decrees. *United States* v. *Jones*, 131 U. S. 1; *United States* v. *Turner*, 47 F. (2d) 86 (C. C. A. 8th); *Leather & Leigh* v. *United States*, 61 C. Cls. 388; *Jackson* v. *United States*, 27 C. Cls. 74.[10]

On like principle, the Tucker Act should be construed in strict conformity with the purpose of Congress to provide a forum for the adjudication

---

Burr, 309 U. S. 242, 247), it has never been relaxed as to the suability of the United States itself. Cf. *Shaw* v. *United States*, 309 U. S. 495; *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506.

[10] The equitable jurisdiction of the Court of Claims is limited to reforming contracts sued on when necessary to render a money judgment. *Leather & Leigh* v. *United States*, *supra*.

of claims "against the United States" and should not be extended to proceedings arising out of and incidental to controversies between private persons.

3. *Federal Housing Administration* v. *Burr*, 309 U. S. 242, upon which the court below relied, is not opposed to our position. In that case this Court held that the Federal Housing Administration was subject to garnishment under Section 1 of the National Housing Act, as amended, authorizing the Administrator "to sue and be sued in any court of competent jurisdiction, State or Federal." Although the decision would seem to be limited to cases "where federal governmental corporations are concerned" (*id.* at 245), the court below concluded that "In the light of the *Burr* case the question whether garnishment or like process may be brought on a Tucker Act claim must be reexamined." (R. 27.) The opinion below, it is true, disclaims any intention of making such a "general reexamination" (R. 27), but it is difficult to distinguish the present action from any other third-party proceedings involving separate issues between private parties.

The extension of the doctrine of the *Burr* case from modern federal governmental corporations to the United States itself seems wholly unwarranted. The legislative and constitutional purpose of the Tucker Act, conferring a limited jurisdiction upon specially constituted federal courts, is quite unlike that of the corporate "sue-and-be-sued" clause, au-

thorizing proceedings in any court, state or federal, of general jurisdiction. The Tucker Act was enacted against an entirely different background and at a time when the "climate of opinion" with respect to governmental immunity was wholly different than it is today. Cf. *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 381, 391. The suability of the United States under the Tucker Act, like the suability of "municipalities, counties and the like" involves policies and considerations "not germane to the problem of amenability to suit of the modern federal governmental corporation." See *Federal Housing Administration* v. *Burr, supra,* at 247. The key to the *Burr* decision is not an abstract concept of "suability" but the role of the modern governmental corporation in the milieu in which it was created. The Court in the *Burr* case, by reaffirming *Buchanan* v. *Alexander,* 4 How. 20, as to assets under control of the United States as distinguished from its corporations, seems plainly to have indicated that its decision did not extend to the United States itself. And certainly the considerations which dictated decision in the *Burr* case do not warrant a similar decision here. To the contrary, every consideration of policy imperatively suggests that the jurisdiction conferred by the Tucker Act, as it was enacted in 1887, should not, without Congressional action, be tortured into a different and "modern" jurisdiction, either through judicial enlargement

or through the implementation of state statutes and state court orders.

4. The present case exemplifies in striking fashion the anomalous situation which results from seeking to blend statutes like Section 795 with the Tucker Act. The three pleaded causes of action which Sherwood alleges that Kaiser has against the United States total in excess of $10,000; this would raise a jurisdictional obstacle to maintenance of the action under the Tucker Act were it not for the limitation of Sherwood's prayer for judgment to $10,000. The court below held, correctly we believe, that the order of the New York court did not vest title to the claim in the judgment creditor. Cf. *Becker* v. *Romanzo*, 245 App. Div. 185, 281 N. Y. S. 317; *Rosen* v. *Lipshitz*, 149 Misc. 144, 266 N. Y. S. 797.[11] Accordingly, one may well inquire as to the source of Sherwood's power to remit a part of Kaiser's alleged claim, no such power having been conferred by the state court order or by Section 795; and whether at the same time Kaiser can be protected up to the full amount of his alleged

[11] This conclusion is fortified by the requirement of Section 795 that the judgment debtor be made a party defendant. In this critical respect, at least, a judgment creditor under Section 795 is unlike a receiver in supplementary proceedings, who under the express terms of Sections 804–810 of the New York Civil Practice Act (which are part of the same article of the Act as Section 795) acquires title retroactively to the date of the institution of the supplementary proceedings. Under Section 795 no title at all is conferred upon the judgment creditor.

claim, the court can retain jurisdiction, and the United States can have the benefit of *res judicata* as to the entire alleged claim. We know of no principle, in the absence of title vested in the judgment creditor, that permits him to waive part of the judgment debtor's cause of action. Cf. *Hill* v. *United States,* 40 Fed. 441 (D. Mass.).

Moreover, Kaiser's first cause of action, as pleaded by Sherwood, is on a claim unliquidated in amount, which Sherwood, by pleading, has fixed at $10,000, the jurisdictional limit under the Tucker Act. Again, one may inquire as to Sherwood's power so to limit the claim, none having been conferred by the state court order or by Section 795. At least Kaiser as a party could contest the limitation, showing that he is not a mere formal party. In a court of limited jurisdictional amount this may be jurisdictionally significant.[12]

Again, Sherwood's judgment against Kaiser is in the amount of approximately $5,500 (R. 11),[13] while the three alleged causes of action total $14,445.49 and the prayer for judgment is $10,000; hence the claim, even as remitted by the prayer,

---

[12] This difficulty, although there are no New York decisions on the point, is suggestive that a person "*indebted*," within the meaning of Section 795, may mean a person against whom a liquidated claim is asserted, a suggestion reinforced by the phrase "recovery of such *debt*," the stated purpose of the proceeding authorized by Section 795.

[13] Apparently the precise principal amount of the judgment is $5,567.22. See order, Appendix, *infra*, p. 63.

exceeds Sherwood's interest by approximately $4,500. In whose favor will judgment run and whom shall the United States pay? Will a split judgment be entered if recovery exceeds $5,000? The state court order relied on by respondent is silent on these questions. Section 795 makes provision for an appropriate judgment to dispose of any recovery in excess of the sum required to pay the creditor's judgment, costs, disbursements, and expenses allowed by the court. But here the judgment to be entered is the judgment of the District Court under the Tucker Act, and it is difficult to conclude that such judgments are within the power of the New York legislature to regulate. Nor are such judgments, appropriate enough in bankruptcy courts, compatible with the simple court of claims jurisdiction of the District Courts.[14]

---

[14] The holding by the court below that the two actions should be consolidated presents added difficulties. The Government has already sued the judgment debtor on the same contract in an independent action and the judgment debtor has demanded a jury trial in that action (R. 6). The court below held that the two actions should be consolidated because of "procedural advantages" (R. 30). This consolidation issue squarely raises the jury trial question. The action by the Government invokes the "general" jurisdiction of the District Court; that against the Government invokes the "exceptional jurisdiction" of the District Court "concurrent with the Court of Claims where it sits without a jury". *United States* v. *Pfitsch*, 256 U. S. 547, 550; see also *Williams* v. *United States*, 289 U. S. 553. The consolidation presents the curious situation of one court sitting in two capacities at one and the same time. Cf. *United States* v. *Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2d). In one action jury

Neither respondent nor the court below has cited any case, and we know of none, in which an action in any way similar to this one has been sustained. The very absence of such cases, in the long history of the Tucker Act, is an indication of a common understanding that the Tucker Act never contemplated this type of action. If there has been a change in controlling opinion on the subject since enactment of the Tucker Act in 1887, or if there is now need to modernize the Tucker Act in this connection (and, unlike the case of modern governmental corporations, we know of no expression of such opinion or evidence of such need), Congress, if it sees fit, can set up a uniform scheme for such procedure, as it did in cases where the Government is the claimant (28 U. S. C.

---

trial is forbidden; in the other it is required. The suggestion of the court below that the "Form of trial is determined for each issue, not for the action as a single unit" (R. 24) is beside the point. Every issue in a suit under the Tucker Act is without a jury. Moreover, in this case the *same* issues would have to be tried at once both with and without a jury. Any analogy to the union of law and equity is likewise beside the mark. In authorizing the union of law and equity cases, Congress took pains to preserve inviolate the right of jury trial (Act of June 19, 1934, c. 651, 48 Stat. 1064, 28 U. S. C. § 723c; see also Rules 38a, and 39, F. R. C. P.), preservation of which is rendered impossible in a union of Tucker Act jurisdiction and general jurisdictional. See *Stark* v. *United States*, 14 F. (2d) 616, 618 (S. D. Ohio); *Lynn* v. *United States*, 110 F. (2d) 586 (C. C. A. 5th); *cf.* Proceedings of the Washington Institute on Federal Rules (Thursday Afternoon Session, October 6, 1938) p. 79.

287817—41——5

§§ 748–750), or give other legislative treatment to the matter. But in the absence of such Congressional action, we perceive no justification for judicial extension of Tucker Act jurisdiction beyond the limits which, since 1887, have consistently been recognized as marking its scope.

That the entire problem of insuring payment of judgments by means of the debtor's claims against third parties is one for legislative action is plainly indicated by the various state statutes on the subject.[15] We note in the margin the variety of proceedings provided for by the laws of the different states;[16] affirmance of the judgment below

---

[15] See, *e. g.*, Cal. Code of Civil Procedure Section 720; Idaho Code Ann. (1932) Section 8–504; Mich. Stat. Ann. V. 22, Section 27.2176; Nevada Comp. Laws (1929), V. 4, Section 8866; Rev. Code of Mont. (1935), V. 4, Section 9460; N. D. Comp. Laws (1913), V. 2, Section 7785; Kent. Code of Practice (Carroll 3d ed. 1900) Section 227; Williams Tenn. Code Ann. (1934), V. 6, Section 9444; Wis. Stat. (1935), Sections 267.01–267.21; Wyo. Rev. Stat. (1931) Section 89–3117.

[16] In some states, only a receiver may bring the action. Mich. Stat. Ann. V. 22, Section 27.2176; N. D. Comp. Laws (1913) Section 7785. In others the action can be brought only if the debt is more than $50. Idaho Code Ann. (1932) Section 8–504; Nev. Comp. Laws (1929) Section 8866. In Kentucky, the action may be brought even before judgment in the main action. Kent. Code of Practice (Carroll 3d ed. 1900) Section 227. Similarly, in Wisconsin, the action may be brought either before or after judgment. The debtor must be served, and may defend on any ground available to his debtor, and the third party may defend the principal action, or interplead other parties. Wis. Stat. (1935) Sections 267.01–267.21. In Tennessee the statute specifically provides that the judgment entered in the action is conclusive as be-

would expose the United States to this variety of proceedings. It seems hardly likely that Congress intended that the suability of the United States depend on the particular variations of state law. The Tucker Act on its face does not suggest it and we submit that it should not be so construed. Cf. *United States* v. *Michel,* 282 U. S. 656; *Price* v. *United States,* 174 U. S. 373; *Schillinger* v. *United States,* 155 U. S. 163.

Moreover, it must be remembered that, whatever the extent of the Tucker Act's consent to suit, it does not, unlike corporate "sue-and-be-sued" clauses, extend to suits in state courts. Consequently, suits against the United States based on state statutes like Section 795, if maintainable, must universally be tried in the federal District Courts setting as courts of claims, or in the Court of Claims. Certainly the Tucker Act did not intend that ordinary state court actions be completed in the federal courts, by the device of making the Government the third party in supplementary proceedings.

The court below rejected the Government's contention of immunity on the ground that a receiver in supplementary proceedings appointed under

---

tween the third party and the judgment debtor. Williams Tenn. Code Ann. (1934) Section 9444. And some states limit recovery to the amount owed by the judgment debtor to the judgment creditor. In these latter cases, there would seem to be nothing to prevent another action by the judgment debtor. See *Ruff* v. *Ruff*, 85 Pa. St. 333; *Cameron* v. *Stollenwerck*, 6 Ala. 704; *Barton* v. *Albright*, 29 Ind. 489.

Sections 804–810 of the New York Civil Practice Act could bring the present action "without doubt" and despite the "cry of garnishment" (R. 28). To this there are several answers. First, a receiver in supplementary proceedings, unlike a judgment creditor, acquires title to the judgment creditor's claim (Sections 804–810 New York Civil Practice Act) and can sue third persons without joining the judgment debtor as a party defendant. Second, judgment for the entire recovery would be entered in favor of the receiver. Third, in such a suit there are no controversies for adjudication between the judgment debtor and the receiver or the judgment creditor. Fourth, it has never been held that a receiver in supplementary proceedings (as distinguished from a general equity receiver like those in the cases cited by the court below in this connection) can maintain a suit against the United States in the Court of Claims or in the District Court under the Tucker Act. And fifth, the decision of the Court of Claims in *Howes & Co.* v. *United States,* 24 C. Cls. 170, looks the other way.

B. THE JURISDICTION OF THE DISTRICT COURT UNDER THE TUCKER ACT IS NOT ENLARGED BY THE FEDERAL RULES OF CIVIL PROCEDURE

The basis of the ruling of the court below was "that by the Tucker Act *and* Rule 17 (b) [of the Federal Rules of Civil Procedure], consent is given to a suit brought by a judgment-creditor of the

person holding a claim against the United States, who has been authorized by state law to conduct the action" (emphasis supplied). The court did not hold that the Tucker Act alone authorized the action; it expressly found consent in the "Tucker Act *and* Rule 17 (b)". This, we believe, was fundamental error.

The Government, of course, recognizes that the Federal Rules of Civil Procedure apply to cases brought under the Tucker Act.[17] Our contention is that the Rules do not purport to and cannot operate to enlarge or alter the Tucker Act jurisdiction;[18] and that the Rules as construed and ap-

---

[17] In *Lynn* v. *United States*, 110 F. (2d) 586, 588–589 (C. C. A. 5th), the Circuit Court of Appeals for the Fifth Circuit went beyond the Government's contention there, and held that an action under the Tucker Act is neither an action at law nor a suit in equity and, seemingly, that the Federal Rules of Civil Procedure are, therefore, inapplicable. We think the suggestion is erroneous. Rules 4 (d), 12 (a), 39 (c), and 55 (e) expressly contemplate suits against the United States, and nothing in the enabling act (48 Stat. 1064) suggests that the Rules are inapplicable to Tucker Act proceedings, which in terms are to accord with court rules and their subsequent modifications (Sec. 4, Act of March 3, 1887, 24 Stat. 505).

[18] There is nothing in the Federal Rules of Civil Procedure that authorizes this action in the federal courts. Rule 69 (a) of the Federal Rules provides for supplementary proceedings in aid of execution to be in accordance with state practice. But Rule 69 (a), while it operates as a conformity rule on enforcement in federal courts of federal judgments, does not authorize a federal court, upon an order of a New York court, to entertain a supplementary proceeding in aid of execution of a New York judgment. See *Bicknell* v. *Lloyd-Smith*, 109 F. (2d) 527, 528–529 (C. C. A. 2d); *cf. Rader* v. *B. & O. R. Co.*, 108 F. (2d) 980, 986 (C. C. A. 7th).

plied by the court below have an effect which is substantive and jurisdictional on three questions. The first is the right of the plaintiff to maintain the action; the second is the joinder of other parties defendant with the United States; and the third, related to the second, is the enlargement of the scope of controversy justiciable by the district courts exercising jurisdiction concurrent with the Court of Claims.

Rule 17 (b), in so far as here involved, provides that "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile." This Rule seems plainly inapplicable to the present case, quite apart from any question of the jurisdiction of the court under the Tucker Act. The respondent's capacity to sue and be sued is not in controversy. There is no suggestion that respondent is without "capacity to sue" because of infancy, insanity, coverture or alienage, or any other disqualification. And it is to those disqualifications that Rule 17 (b) obviously refers, not to the substantive right of a third person "to maintain an action" which is the subject matter of Section 795.[19] The conclusive answer, however, is that if this suit could not

[19] Under state practice a non-resident judgment creditor can take advantage of Section 795 without regard to the law of his domicile. New York Civil Practice Act, Section 773.

have been previously maintained under the Tucker Act, Rule 17 (b) does not undertake to authorize it. Rule 82, carrying out the mandate of the statute authorizing the rules, expressly provides that the rules do not extend or limit the jurisdiction of the district courts. Similarly, it is settled that the states can not enlarge or restrict the jurisdiction of the federal courts. *Munro* v. *United States,* 303 U. S. 36, 41; *Penn Co.* v. *Pennsylvania,* 294 U. S. 189, 197; *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 175. It follows as a matter of course, therefore, that the combination of a state statute, a state court order, and a federal procedural rule can not have the effect of extending the jurisdiction of the District Court under the Tucker Act.

Likewise, a non-resident judgment creditor on a federal court judgment in New York can take advantage of Section 795 in the federal court without regard to the law of his domicile. Rule 69 (a). Yet the effect of basing jurisdiction on Rule 17 (b), as the court below did, means that a proceeding under Section 795 to enforce a New York judgment may be maintained in the federal courts by a New York resident but may not be maintained by a non-resident. This is so because Rule 17 (b) expressly makes the law of the plaintiff's own domicile applicable. Moreover, the court's construction of Rule 17 (b) as referring to the right to maintain an action would render Rule 9 (a) meaningless in this connection since under Rule 9 (a) the capacity to sue need not be pleaded. Here, the allegation of the state court order was an essential allegation.

C. EVEN APART FROM THE LIMITATIONS OF THE TUCKER ACT, THE FEDERAL COURTS HAVE NO JURISDICTION TO ENTERTAIN SUPPLEMENTARY PROCEEDINGS IN CASES WHERE THEY WOULD HAVE HAD NO JURISDICTION TO ENTERTAIN THE ORIGINAL ACTION

The doctrine is well established that the courts of one jurisdiction or sovereign will not entertain supplementary proceedings in aid of execution of a judgment of a court of another jurisdiction or sovereign. Thus, the New York courts have held that they would not entertain such proceedings in aid of execution on a judgment of a court of another state (*Rocky Mountain National Bank* v. *Bliss,* 89 N. Y. 338; see also *Matter of Maltbie* v. *Lobsitz Mills Co.,* 223 N. Y. 227) or of a federal court (*Davis* v. *Bruns,* 23 Hun. (N. Y.) 648; *Tarbell* v. *Griggs,* 3 Paige (N. Y.) 207; *Tompkins* v. *Purcell,* 12 Hun. (N. Y.) 662). Similarly, the federal courts in New York have held that they would not entertain proceedings ancillary to original suits in the state courts. *Claflin* v. *McDermott,* 12 Fed. 375 (S. D. N. Y.); *Walser* v. *Seligman,* 13 Fed. 415 (S. D. N. Y.); see also *National Tube Works Co.* v. *Ballou,* 146 U. S. 517.

The case at bar is analogous to the cases where attempt was made to remove to the federal court a garnishment suit brought in aid of execution on a state court judgment, removal being sought on the ground of diversity of citizenship between the garnishor and garnishee. The garnishment proceedings were remanded to the state court because

they were not independent suits within the meaning of the removal statutes, but merely modes of execution, inseparably connected with the original action, over which the federal courts had no jurisdiction. *Weber* v. *Humphreys,* 5 Dillon 223 (E. D. Mo.); *Pratt* v. *Albright,* 9 Fed. 634 (E. D. Wis.); *Buford* v. *Strother,* 10 Fed. 406 (D. Iowa); *Poole* v. *Thatcherdeft,* 19 Fed. 49 (D. Minn.); *King* v. *Shepherd,* 20 Fed. 337 (N. D. Iowa); *Brucker* v. *Georgia Casualty Co.,* 14 F. (2d) 688 (E. D. Mo.); *Lahman* v. *Supernawt,* 47 F. (2d) 610 (N. D. Okla.). Similarly, after judgment in a state court, if a third party claims as his the property of the defendant, the proceeding involving that issue is not removable to the federal courts because it is only supplementary to the original action. *Bank* v. *Turnbull & Co.,* 16 Wall. 190; *Chapman* v. *Borger,* 4 Dillon 557; *Flash* v. *Dillon,* 22 Fed. 1 (E. D. Tex.).

In *Mutual Reserve Fund Life Assn.* v. *Phelps,* 190 U. S. 147, a judgment was recovered in a Kentucky court against a foreign corporation. After execution was returned *nulla bona,* the judgment creditor in aid of execution on the judgment sought the appointment of a receiver to take charge of the corporation's business and to collect its debts, the receivership to continue until the judgment was paid. The corporation applied for removal to the federal court which was denied. It then commenced an action in the federal court against the

receiver and the judgment creditor to enjoin them from proceeding further. The suit was dismissed, this Court saying (p. 159):

> Again, the proceeding for the appointment of a receiver was not a new and independent suit. It was not in the strictest sense of the term a creditor's bill. It did not purport to be for the benefit of all creditors, but simply a proceeding to enable the plaintiff in the judgment to obtain satisfaction thereof, satisfaction by execution at law having been shown to be impossible by the return of *nulla bona*. It is what is known as a supplementary proceeding * * *. It was initiated by the filing of an amended and supplementary petition. It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment. As such it was not subject to removal to the Federal court, the time therefor prescribed by statute having passed. * * * Being a mere continuation of the action at law, and not removable to the Federal court, the latter had no jurisdiction to enjoin the proceedings under it.

The present case seems to be the first reported instance in which such supplementary proceedings were originally instituted in the federal courts. But the principle that the jurisdiction of the federal courts does not extend to supplementary proceedings where the principal action could not have been brought within the federal jurisdiction seems equally applicable whether the question is raised in

connection with an attempted removal of such proceedings to the federal courts or in connection with the original institution of such procedings in the federal courts. And the principle applies with peculiar force where the jurisdiction of the federal courts is invoked under the Tucker Act—a jurisdiction which, as we have shown, is far more limited than the "general" jurisdiction of the District Courts.[20]

II

THE MAINTENANCE OF THIS ACTION IS PRECLUDED BY R. S. § 3477

Under the express provisions of R. S. § 3477 (31 U. S. C., § 203) the order of the state court authorizing the respondent to prosecute Kaiser's claim against the United States is "absolutely null and void". The statute provides as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein,

---

[20] *Lackawanna Coal & Iron Co.* v. *Bates*, 56 Fed. 737 (W. D. Mo.), and *London & Lancashire Indemnity Co.* v. *Courtney*, 106 F. (2d) 277 (C. C. A. 10th), holding that the particular actions there involved were independent suits and not merely supplementary proceedings and hence were removable to the federal courts, are only applicable to the narrow question of whether the present suit is supplementary. Even on that narrow question those cases are distinguishable because Section 795, unlike the statutes there involved, requires joinder of the original defendant and permits the order of the court in the original action to regulate various aspects of the proceeding which the judgment creditor is authorized to institute.

whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, *after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.* Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors. [Emphasis supplied.]

One purpose of the statute was to guard against the danger that by the transfer of a claim against the United States, "the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest." *Good-*

man v. *Niblack*, 102 U. S. 556, 560. No less important, however, was the purpose of preventing the Government from being "harassed by multiplying the number of persons with whom it had to deal" and from "becoming embroiled in conflicting claims, with delay and embarrassment". *Hobbs* v. *McLean*, 117 U. S. 567, 576; *Martin* v. *National Surety Co.*, 300 U. S. 588, 594; *Nutt* v. *Knut*, 200 U. S. 12, 20.

In the case at bar, there is no contention that the conditions of the statute, if applicable, have been met. Kaiser's claim has not been allowed, there has been no "ascertainment of the amount due" and no warrant for its payment has been issued. Not only does the present transfer fail to meet these conditions, but it appears affirmatively that the United States has brought suit against Kaiser for breach of the very contract on which the present action is based. Under these circumstances it is apparent that sustaining respondent's position would defeat the purpose of the statute.

1. The order of the state court obviously multiplies the number of persons with whom the Government must deal. As we have pointed out, Kaiser's claim against the United States, as alleged by Sherwood, is in the amount of approximately $15,000, and a recovery of $10,000 is sought (R. 15–19). Sherwood's claim against Kaiser, however, is only for approximately $5,500 and his interest in any recovery is limited accord-

ingly. Consequently, any judgment rendered by the District Court against the United States for an amount in excess of $5,500 would have to provide for the disposition of the surplus; this, as we have previously observed, is expressly contemplated by Section 795 of the New York Civil Practice Act. The surplus would necessarily be awarded either to Kaiser, who is a party defendant, or to other judgment creditors who may be authorized by the New York courts to participate in the proceeding (see p. 18, *supra*). It is apparent, therefore, that the maintenance of a Section 795 proceeding against the United States means that the Government may be "embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction", a result which R. S. § 3477 was specifically designed to avoid. *Goodman* v. *Niblack*, 102 U. S. 556; *Hobbs* v. *McLean*, 117 U. S. 567, 576; *Martin* v. *National Surety Co.*, 300 U. S. 588, 594.

This is not a mere theoretical consideration. If the decision below be sustained, negotiations for the adjustment and settlement of Kaiser's and the Government's claims against each other cannot succeed without the consent and cooperation of a third party and, indeed, of any other creditor of Kaiser who may be authorized to maintain an action on Kaiser's claim. In this connection, it is significant that the Assignment of Claims Act of

1940 (Public, No. 811, c. 779, 76th Cong., 3d Sess.), which relaxes the prohibition of R. S. § 3477 in certain cases, prohibits partial assignments. See also H. Rep. No. 2925, 76th Cong., 3d Sess.; S. Rep. No. 2136, 76th Cong., 3d Sess.

The Government would be subject to the same harassment even if the respondent's judgment equalled or exceeded the amount of Kaiser's claim against the United States. The United States would still be required to deal with both the original claimant and his judgment creditor and such dealings would be embarrassed by the conflicting interests of the two claimants. The United States is suing Kaiser in a separate proceeding for breach of the contract on which Kaiser's claim is based. Kaiser, in that action, could defend or admit liability. He might also seek a compromise releasing his claim in exchange for a release from the Government, or for a reduction in the Government's demand. These things he is precluded from doing if Sherwood is permitted in effect to attach his claim. The last paragraph of the state court order forbids Kaiser from making any "disposition" of his claim against the United States; this prohibition, operating in form against the claimant, operates in effect against the United States by preventing it from obtaining a release of the claim from Kaiser or otherwise adjusting the claim.

Sherwood certainly would have no interest in releasing Kaiser's claim against the United States in return for a release of the Government's claim against Kaiser. Sherwood is not a general representative succeeding to all of Kaiser's assets and liabilities. His sole interest is in satisfying his judgment, and the risk to him in prosecuting Kaiser's claim to judgment may be less than it would be to Kaiser since Sherwood may have execution on any other assets which Kaiser may have. Moreover, while Sherwood incurs the risk that judgment on the Government's claim may defeat any recovery on Kaiser's claim, he does not share the further risk facing Kaiser of liability on an affirmative judgment in favor of the United States.

It was for reasons of this character that the Court of Claims early held invalid an order of a state court appointing a receiver to prosecute an individual claim against the United States. *Howes & Co.* v. *United States,* 24 C. Cls. 170. In the *Howes* case, a judgment creditor whose judgment remained unsatisfied filed a supplementary petition in a state court praying for the appointment of a receiver of the claim of Howes & Co. against the United States for the undistributed portion of an award which the company was prosecuting before the Court of Commissioners of Alabama Claims. The state court appointed the receiver, who attempted to recover

from the Government. The Court of Claims, holding the order void under R. S. § 3477, stated (p. 183–184):

> One of the obvious benefits to the United States to be derived from the statute making assignment of claims void was the right of the officers of the Government to have the original creditor or, in case of death or general assignment of his estate, his successor to all his business affairs to deal with in settling accounts, unembarrassed by controversies between him and his creditors. The value of that right is clearly shown in this very case. After appointment of this receiver, the Government made a settlement with Jabez Howes, one of the original claimants, by which he released his share in the claims now in suit and ratified and confirmed the action of the accounting officers in crediting one-half on a judgment debt against him and others in favor of the United States; and this was done to assist in effecting a settlement and discharge of the latter judgment. This release would not have been valid if the transfer by the California court were sustained and the Secretary of the Treasury were bound to recognize it.
>
> * * * * *
>
> If attachments, subrogations, and assignments, such as those relied upon by the claimant, Wells, as receiver, should be upheld, the Government would not only be de-

> prived of the right to settle with those claimants to whom it was originally indebted, whose estates became thus attached, but might also be involved in controversies between such claimants and their creditors as well as between conflicting attaching creditors in different courts, contrary to the spirit if not the letter of the law, passed to prevent frauds upon the Treasury of the United States.

2. The court below was of the opinion that R. S. § 3477 was no bar to this action because Section 795 of the New York Civil Practice Act "does not bring about an assignment or transfer of title of the debt to the judgment-creditor, but merely confers upon him a power to bring an action", and for the further reason that "if Section 795 does provide for an actual assignment of the claim, nevertheless it is then an assignment by operation of law" and therefore not within the inhibition of R. S. § 3477 (R. 26).

The suggestion that Section 795 of the New York Civil Practice Act does not bring about a transfer or assignment of the claim is beside the mark, since R. S. § 3477 invalidates "powers of attorney, orders, or other authorities for receiving payment", as well as assignments or transfers.

Nor is there anything in the language or policy of R. S. § 3477 which renders the statute inapplicable to all assignments by operation of law. As this Court observed in *Spofford* v. *Kirk*, 97 U. S. 484,

488–490, "It would seem to be impossible to use language more comprehensive than this". And in *Goodman* v. *Niblack,* 102 U. S. 556, the Court, although holding the particular assignment there involved to be beyond the purview of the statute, specifically recognized that the statutory language "is broad enough * * * to include transfers by operation of law * * * *." Where, as in the case at bar, an assignment by operation of law may result in multiplying the number of persons with whom the Government has to deal and may thereby embarrass the conduct of the Government's business, the fundamental policy of the law would seem to require that the transfer be held violative of the statutory prohibition.

It is true that in a number of cases, this Court has said that certain transfers by operation of law are beyond the scope of R. S. § 3477. *Erwin* v. *United States,* 97 U. S. 392, 397; *Price* v. *Forrest,* 173 U. S. 410; *Seaboard Air Line Ry.* v. *United States,* 256 U. S. 655; *Western Pac. R. R. Co.* v. *United States,* 268 U. S. 271. But the Court has made a similar determination with respect to certain types of voluntary assignments. *Goodman* v. *Niblack,* 102 U. S. 556. Reading both lines of authority in conjunction, it is clear that all the decisions were based upon the policy of the Act and not the form of the transfer, and that any transfer which conflicts with both the letter and policy of the statute falls within its sphere of operation, whether the transfer be by operation of law or not.

The type of situation to which R. S. § 3477 is inapplicable is that presented where all of the claimant's property has been transferred by operation of law to the claimant's successor or representative, whether by descent (cf. *Erwin* v. *United States, supra*), consolidation in corporate reorganization (*Seaboard Air Line Ry.* v. *United States, supra*), purchase at a judicial sale in such reorganization (*Western Pacific R. R. Co.* v. *United States, supra*), or through some other change in the claimant's legal status. Similarly, R. S. § 3477 is inapplicable to a purely voluntary assignment of all of the claimant's assets for the benefit of creditors. *Goodman* v. *Niblack*, 102 U. S. 556. In such cases there is a complete substitution of an authorized representative in the place and stead of the original claimant. In this type of situation, it is necessary to withdraw the transfer from the operation of R. S. § 3477 in order to effectuate the policy of the statutes which provide for the appointment of receivers and trustees in bankruptcy, and executors and administrators of decedents' estates, and to prevent unjust enrichment to the United States by way of windfall. In cases of this class it is not only obvious that there must be representative action, but it is likewise clear that such representative control does not embarrass the Government which simply deals with the substituted representative as it would have dealt with the claimant if there had been no sub-

stitution. Prior to the death or bankruptcy the Government could sue the claimant, or it could counterclaim against him if the claimant sued first, and recover an affirmative judgment. It is in precisely the same position with reference to the executor, administrator, or trustee in bankruptcy.[21]

The only cases in which transfers of claims against the United States have been sustained by this Court in the absence of a general transfer of all the claimant's assets are those where the claim had already been adjusted and allowed and where, therefore, the Government was merely in the position of a stakeholder, the duty of the Government officer to pay being purely ministerial and enforceable by mandamus. For example, in *Price* v. *For-*

---

[21] It is true that R. S. § 3477 has been held inapplicable to the purchase at a judicial sale of all the assets of a corporation in reorganization (*Western Pacific R. R. Co.* v. *United States*, *supra*) and that the purchaser at such a sale does not necessarily succeed to all the liabilities of the original claimant. In the *Western Pacific* case, however, no question of embarrassment to the Government in the settlement of any counterclaim was involved. In view of the nature of reorganization proceedings, no such question could arise even if the Government had a claim against the original corporation. In such proceedings, all claims against the original corporation would be presented to the receiver and allowed or disallowed prior to the sale in order to determine the claimant's status under the reorganization plan. The respective claims of the Government and the original corporation would be adjusted and the Government's position as net creditor or debtor would be determined prior to sale. As a practical matter, therefore, the Government would never be required to deal with more than one person in a reorganization case.

rest, 173 U. S. 410, relied on by the court below, a debtor was directed by court order to deliver and endorse to a receiver any draft obtained from the Government in payment of the debtor's claim and to consent in writing that any balance which might be allowed should be paid to the receiver. After the claimant's death, the debtor's heirs were enjoined from demanding or receiving payment from the Government. The question whether the Government officials could be enjoined from paying any award to the original claimant or his heirs was not decided. The Court said (p. 423, 424):

> We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the government from withdrawing the proceeds of such claim from the reach of his creditors; *provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government, nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States.* * * * Even if it be true that the final order of the state court in relation to the money in question would not impose any legal duty upon the officers of the Treasury, it does not follow that the order of court appointing the receiver would be null and

> void, as between those who are parties to the cause and who are before the court. [Emphasis supplied.]

Similary, in *Houston* v. *Ormes*, 252 U. S. 469, the Court held that R. S. § 3477 was not a bar to an action seeking to establish a lien for attorneys' fees on a fund appropriated by Congress to a specific claimant and to require the Secretary of the Treasury to pay the fund to a receiver. The decision was placed upon the ground that the statute was inapplicable to an assignment by operation of law "after the claim has been allowed." *Id.* at 474.[22]

The foregoing analysis demonstrates, we believe, that the holding of the court below that R. S. § 3477 is not a bar to the maintenance of the present

[22] The decisions of the lower federal courts invoked by respondent (Br. in Opp., p. 5) are not in point. All of them involved a controversy between private persons as to the ownership of the funds after payment had been made by the Government to the original claimant or his estate. In one of the cases, *Bray* v. *United States Fidelity & Guaranty Co.*, 267 Fed. 533 (C. C. A. 4th), the question of the application of R. S. 3477 was not even raised. The statement in *In re Gerstenzang*, 5 F. Supp. 904 (S. D. N. Y.), that R. S. 3477 is inapplicable to a judicial sale of a claim for refund of customs duties was entirely *obiter*, the court holding that a sale of "stocks" of a bankrupt did not convey title to a "claim" against the Government. In *In re Pottasch Bros. Co.*, 79 F. (2d) 613 (C. C. A. 2d), the Government had paid the claim to the estate of the original claimant and the court merely held that creditors claiming under an order of a referee in bankruptcy entered prior to such payment were entitled to receive the fund from the trustee.

action finds no support in the decisions of this Court.[23] And since, as we have shown, the type of transfer of claim provided for by Section 795 of the New York Civil Practice Act violates both the letter and purpose of the statutory bar, we believe it evident that the court below erred in reversing the order of the District Court dismissing the complaint.

III

SECTION 795 OF THE NEW YORK CIVIL PRACTICE ACT DOES NOT AUTHORIZE SUPPLEMENTARY PROCEEDINGS AGAINST THE UNITED STATES

If the Court should reject the contentions advanced in the preceding sections of this brief, a further question of local law must be examined, namely, whether Section 795 of the New York Civil Practice Act authorizes actions against the United States. The section, in terms, provides for supplementary proceedings against a "person or corporation * * * indebted to the judgment-debtor". It is the Government's position that the

---

[23] The question whether garnishment proceedings are in violation of R. S. 3477 was not considered by the Court in *Federal Housing Administration* v. *Burr*, *supra*. Since the debtor's claim was admittedly due and owing, the transfer did not come within the operation of R. S. 3477 (cf. *Houston* v. *Ormes*, 252 U. S. 469, 474) and the Administration did not invoke the statute as a defense, although the Government's brief in this Court pointed to R. S. 3477 as indicating a policy in a related field. It may well be, moreover, that government corporations, to which the Federal Housing Administration was assimilated in the *Burr* case, are not "the United States" within the meaning of R. S. 3477. Cf. *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1.

term "person" as used in Section 795 does not include the sovereign, state or federal, and that, in any event, it does not include the United States.

The New York state courts have not yet construed the statute on this point. The court below, "With some hesitation", ruled that "the sovereign is included within the word 'person' in Section 795" (R. 30) and that "If the legislature intended to include the state as a person in Section 795, it would seem to follow that the United States is likewise so included." (R. 30.) The court considered that "speculation over actual intent [of the New York legislature] is futile" and, making its own "estimate of whether or not the injuries done to the sovereign by including it within the purview of the statute are so great that the legislature can be presumed not to have intended them" (R. 29), concluded that there was reason to believe that the New York legislature might think that any embarrassment to the state by these proceedings might be "outweighed by the increased efficiency in execution which might thus be achieved." (R. 29.)

The conclusion that the State of New York is a person within the meaning of Section 795 seems erroneous. There is nothing explicit in the entire chapter on supplementary proceedings (New York Civil Practice Act, Sections 773–810) to indicate that the State of New York is to be so included. The presumption is, of course, that the sovereign is included in the scope of statutes extending bene-

fits and protections.[24] *Stanley* v. *Schwalby,* 147 U. S. 508, 514–517; *Dugan* v. *United States,* 3 Wheat. 172, 181; *Cotton* v. *United States,* 11 How. 228, 231. But it is elementary that the state is not bound by the general terms of a statute which would trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish an otherwise forbidden right of action against it. *Stanley* v. *Schwalby, supra,* 514–517; *United States* v. *Herron,* 20 Wall. 251; *Guarantee Co.* v. *Title Guaranty Co.,* 224 U. S. 152; Sutherland, *Statutory Construction* (2d ed. 1904) Secs. 514, 694; Endlich, *Interpretation of Statutes* (1888) Secs. 161, 167. This same principle has been embodied in Section 37 of the New York General Construction Law which defines "person" so as to exclude the sovereign except in the case of a person whose property may be the subject of an offense. See Curtis, *Statutes and Statutory Construction,* 1 McKinney's *Consolidated Laws of New York,* Sec. 65; cf. *Saranac L. & T. Co.* v. *Roberts,* 195 N. Y. 303, 323. It is significant that Section 684 of the Civil Practice Act, providing for the garnishment of wages—a provision closely related to Section 795—originally contained no express reference to the garnishment of wages of public employees. The New York courts, therefore, construed it to exclude wages of city and state

[24] We urge, for example, in *United States* v. *Cooper,* No. 484, this Term, that the United States takes the benefits of Section 7 of the Sherman Act.

agencies. *Rosenstock* v. *City of New York,* 101 App. Div. 9, 91 N. Y. Supp. 737 (1905); *Osterhoudt* v. *Stade,* 133 App. Div. 83, 117 N. Y. Supp. 809 (1909). Section 684 was then amended so as to include city and state employees. New York Laws 1905, c. 175; New York Laws 1910, c. 317; cf. *Rickey* v. *Slingerland,* 143 Misc. 583, 256 N. Y. Supp. 901. Moreover, even after this amendment, Section 684 has been held inapplicable to the United States. See p. 54, *infra.* In other statutes, too, when the New York legislature has intended the sovereign to be included it has expressly so provided. See, e. g. New York Court of Claims Act, Section 17 (examination before trial in suits brought in the New York Court of Claims).

In view of the doctrine that the state is not bound by the general terms of a statute imposing burdens, the silence of the present statute must be construed so as to exclude the sovereign. See *Minor* v. *Erie R. Co.,* 171 N. Y. 566; *People* v. Miller, 94 App. Div. 567, 88 N. Y. S. 253.[25] At least in the absence of an authoritative construction by the state courts that Section 795 includes the state as a "person indebted", the court below should not have given the statute a construction damaging to the state. The fact that in *Brearton*

[25] The New York courts have held that municipal corporations, not being specifically mentioned, are not included in the sections of the Civil Practice Act dealing with discovery and examination before trial. *Bush Terminal Co.* v. *City of New York,* 259 N. Y. 509; *Davidson* v. *City of New York,* 221 N. Y. 487; *Berryman* v. *Board of Education of City of Buffalo,* 12 N. Y. S. (2d) 135.

v. *Morgan,* 257 App. Div. (N. Y.) 34, *Hollywood Garage Corp.* v. *Pettis & Co.,* 169 Misc. 906, 9 N. Y. S. (2d) 379, and *Heilman* v. *St. Cloud Restaurant, Inc.,* 164 Misc. 15, 297 N. Y. Supp. 111, the State Comptroller appeared in supplementary proceedings is immaterial. The question was not raised in those cases, the Comptroller having other defenses.

Even if the State of New York is a "person" within the meaning of Section 795, it by no means follows that the United States is such a "person." The intent of the New York legislature can not control the sovereign immunity of the United States. *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 231. And, as has been amply demonstrated above, there is at least a substantial doubt whether the United States has consented to be sued in supplementary proceedings instituted under Section 795. The New York statute should, therefore, be construed so as to exclude such actions against the United States in order to avoid grave doubts as to its constitutionality.

The lower New York courts have consistently recognized that the United States is not subject to garnishment under Section 684 of the Civil Practice Act. *Dibner* v. *Cousminer,* 157 Misc. 229, 230, 283 N. Y. Supp. 369, 370; *Bool Floral Co., Inc.* v. *Coyne,* 158 Misc. 13, 14, 284 N. Y. Supp. 960, 961; *Cross Bay Lumber Co.* v. *Samoa,* 161 Misc. 458, 293 N. Y. Supp. 794; *Bowes* v. *Perkins,* 169 Misc. 624, 8 N. Y. S. (2d) 525; see 54 Harv. L. Rev. 518, 519. There is no reason to suppose that the local courts

would reach a different conclusion in construing Section 795, and, in the absence of any controlling decision by the highest court of the state, the rulings of the lower courts should be followed by the federal courts on questions of state practice. *West* v. *American Tel. & Tel. Co.*, Nos. 44, 45, present Term; *Six Companies of California* v. *Joint Highway District*, No. 267, present Term; *Fidelity Union Trust Co.* v. *Field*, No. 32, present Term; *Stoner* v. *New York Life Ins. Co.*, No. 74, present Term. The Supreme Court of Queens County, it is true, authorized proceedings against the United States in this case. But its order was entered *ex parte* and without an opinion and can not, therefore, be considered as a construction of Section 795.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed and the order of the District Court dismissing the complaint should be affirmed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General,
FRANCIS M. SHEA,
Assistant Attorney General.
SIDNEY J. KAPLAN,
MELVIN SIEGEL,
RICHARD H. DEMUTH,
Special Assistants to the Attorney General.
ELLIS LYONS,
Attorney.

JANUARY, 1941.

APPENDIX

1. The pertinent sections of the New York Civil Practice Act provide as follows:

> § 773. IN WHAT CASES JUDGMENT CREDITORS MAY MAINTAIN PROCEEDINGS. To entitle a judgment creditor to maintain a special proceeding authorized by this article, the judgment must have been rendered in any sum by any court of this state, whether or not of record. A decree or order awarding the payment of money shall be deemed a judgment for the purpose of this article. A proceeding may be maintained until such judgment is satisfied, vacated or barred by the statute of limitations.
>
> § 795. ACTION BY JUDGMENT CREDITOR AGAINST THIRD PARTY. Where it appears from the examination or testimony taken or other proof satisfactory to the court that a person or corporation is indebted to the judgment debtor, the court may make an order authorizing the judgment creditor to maintain an action against such person or corporation for the recovery of such debt. Such order may also forbid the transfer or other disposition of such debt until an action can be commenced and prosecuted to judgment and may direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of such action be delivered to the creditor or impounded in court. Such order or the judgment entered in the authorized action may provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment, costs, disbursements

and expenses allowed by the court. Such action by a judgment creditor against the debtor of the judgment debtor shall make the judgment debtor a party defendant, and costs shall be awarded as prescribed by law; but if judgment be in favor of the judgment creditor and against the debtor of the judgment debtor, and the debtor of the judgment debtor did not dispute the indebtedness, then costs are not to be awarded against the debtor of the judgment debtor.

§ 807. VESTING OF PROPERTY IN RECEIVER. The property of the judgment debtor, whether acquired before or any time after the appointment of a receiver, is vested in a receiver who has duly qualified, from time of filing the order appointing him or extending his receivership, as the case may be, subject to the following exceptions in favor of a purchaser in good faith without notice and for valuable consideration.

1. Real property is vested in the receiver only from the time when the order or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

2. Where the judgment debtor at the time when the order is filed resides in another county of the state, his personal property is vested in the receiver only from the time when a certified copy of the order is filed with the clerk of the county where he resides.

2. Section 37 of the New York General Construction Law provides as follows:

SECTION 37. PERSON. The term person includes a corporation and a joint stock association. When used to designate a party whose property may be the subject of any

offense, the term person also includes the state, or any other state, government, or country which may lawfully own property in the state.

3. The Tucker Act, Title 28, Section 41 (20) of the United States Code, Act of March 3, 1887, c. 359, Sections 1, 2, 24 Stat. 505, as amended, provides that the district courts shall have original jurisdiction as follows:

* * * * *

(20) SUITS AGAINST THE UNITED STATES. Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

4. Title 31, Section 203, of the United States Code (R. S. 3477) provides as follows:

§ 203. ASSIGNMENTS OF CLAIMS VOID. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether

absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. * * *

5. Title 28, Sections 748 to 750, of the United States Code (R. S. Secs. 935, 936, 937), provide as follows:

§ 748. GARNISHEES IN SUITS BY UNITED STATES AGAINST A CORPORATION. In any suit by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the

sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States. No judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, nor until the sum in which the garnishee stands indebted is actually due.

§ 749. SAME; ISSUE TENDERED ON DENIAL OF INDEBTEDNESS. When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit.

§ 750. SAME; GARNISHEE FAILING TO APPEAR. If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court.

6. The pertinent Rules of the Federal Rules of Civil Procedure are as follows:

Rule 1. SCOPE OF RULES. These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 9. PLEADING SPECIAL MATTERS.

(a) *Capacity.*—It is not necessary to aver the capacity of a party to sue or be sued or

the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

Rule 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY.

(b) *Capacity to Sue or Be Sued.*—The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

Rule 69. EXECUTION.

(a) *In General.*—Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accord-

ance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

Rule 82. JURISDICTION AND VENUE UNAFFECTED. These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.

7. The order of the Supreme Court of the State of New York purporting to authorize the maintenance of this action is as follows:

At a Special Term of the Supreme Court of the State of New York, Part II thereof, held in and for the County of Kings, at the Courthouse thereof, Fulton and Joralemon Streets, Borough of Brooklyn, City of New York, on the 8th day of February, 1939.

Present: HON. MEIER STEINBRINK, *Justice.*

In the Matter of Supplementary Proceedings:

JACOB L. SHERWOOD, JUDGMENT CREDITOR

against

FREDERICK M. KAISER, JUDGMENT DEBTOR

Upon reading and filing the annexed affidavit of MILTON U. COPLAND, sworn to February 7, 1939, and upon the judgment dated November 29, 1935, and upon all the proceedings heretofore had herein, it is, on mo-

tion of M. CARL LEVINE, MORGULAS & FOREMAN, attorneys for the judgment creditor herein

ORDERED that JACOB L. SHERWOOD, residing at 25–31 88th Street, Jackson Heights, Borough of Queens, City of New York, be and he hereby is authorized and empowered to commence and maintain an action at law against the United States of America under the Act of March 3, 1887, C. 359, Sec. 1, 2, 24, Stat. 505, and amendments thereto, commonly known as the Tucker Act, nunc pro tunc as of September 1, 1937, for damages to FREDERICK M. KAISER, the judgment debtor, arising out of the contract dated January 27, 1933, entered into between said Frederick M. Kaiser and the United States of America for the construction and completion of the Post Office and East Greenwich, Rhode Island, and it is further

ORDERED that the judgment creditor herein be entitled out of any moneys that may be recovered in said action to a sum sufficient to cover the amount of the judgment of $5,567.22 entered on the 29th day of November, 1935, together with interest thereon, as well as costs, disbursements and expenses which may be allowed by the Court, and it is further

ORDERED that said judgment debtor be and he hereby is forbidden to make or suffer any transfer or other disposition of said claim against the United States of America, as aforesaid.

ENTER in Queens County.

STEINBRINK, *J. S. C.*

U. S. GOVERNMENT PRINTING OFFICE: 1941